NO. 461102

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

REGGIE JUNTUNEN., Appellant,

AMENDED BRIEF OF APPELLANT

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TABLE OF CONTENTS

United States Supreme Court Cases

United States Court of Appeals

Washington Supreme Court Cases

Washington Appellate Court Cases

Other Authorities

I. ASSIGNMENTS OF ERROR

1. **The trial court erred it made numerous findings of fact without reliable factual support in the record (each of which is described separately in Section IV, C below).**

2. **The trial court erred when it ruled that Baum's representation was not ineffective assistance of counsel.**

3. **The trial court erred when it denied Mr. Juntunen's motion to withdraw his plea.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **Whether trial court erred it made numerous findings of fact without reliable factual support in the record when no reliable facts in the record supported those findings.**

2. **Whether Baum's representation fell below an objective standard of reasonableness when he failed to hire a consulting DNA expert when he himself admitted that one was essential to challenge the DNA evidence which was the only link between Mr. Juntunen and the charged crimes.**

3. **Whether Baum's consulting with a DNA expert could have alteded the outcome of the guilty plea, either by encouraging Mr. Juntunen to reject the State's offer, or by encouraging the prosecutor's to offer plea bargain of less than 25 years.**

4. **Whether Baum represented Mr. Juntunen despite a conflict of interest when he was prosecuting cases simultaneously within Lewis County while he also represented Mr. Juntunen, under a public contract, within that same county.**

III. STATEMENT OF THE CASE

A. THE CHARGES AND OFFENSE CONDUCT

On July 27, 2012, under cause number 12-1-00473-5, the State charged Mr. Juntunen with multiple sex offenses.[1] In each count the State alleged that the offense was predatory as defined in RCW 9.94A.030(38). The state further alleged additional aggravating factors under RCW 9.94A.535(3).[2] The charges all related to an incident that had occurred five years prior to filing in Lewis County, Washington.[3]

On September 22, 2007, S.E.H. reported that she was sexually assaulted by a dark skinned man in a camping ground within Lewis County.[4] No suspects were identified for five years. Then, in July of 2012, an unidentified expert from the Washington State Patrol's Crime Lab matched Mr. Juntunen's DNA to the DNA found on a tissue located at the scene of the crime.[5]

Significantly, this was the only piece of evidence that linked Mr. Juntunen to the crime.[6] Understandably, five years after the crime, S.E.H. could not identify her attacker, and her general description of a dark shinned male was clearly insufficient for the case to proceed to the jury.[7]

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[1] CP 1-3
[2] *Id.*
[3] The Charges Included Rape of a Child in the First Degree or in the alternative Child Molestation in the First Degree as alleged in count I, Rape in the First Degree or in the alternative Indecent Liberties with Forcible Compulsion as alleged in Count II, and Kidnaping in the First Degree with Sexual Motivation as alleged in Count III. CP 1-6.
[4] CP 8.
[5] CP 9-11.
[6] *See* Baum's Testimony. RP at 65-69 (2.14.14)
[7] *See id.*

B. CHRIS BAUM'S APPOINTMENT, THE PLEA OFFERS, PRE-TRIAL MOTIONS, & MR. JUNTUNEN'S PLEA & SENTENCING HEARINGS.

On July 27, 2012, the Court appointed Chris Baum to represent Mr. Juntunen, which continued until Mr. Juntunen pleaded guilty, less than four months after Mr. Juntunen was arrested for the offense. Mr. Baum represented Mr. Juntunen at his arraignment on August 2, 2012, and the trial court set the first trial date for September 13, 2012.

On September 2, 2012, the State made its initial plea offer, in writing, which would have required that Mr. Juntunen plead guilty to One Count of Rape of a Child in the First Degree while also stipulating that the offense was predatory, thus requiring a mandatory 25 year sentence.[8] Though the State initially demanded that the offer be accepted at the first scheduled child hearsay hearing, it extended the time for acceptance after Mr. Juntunen asked for a new trial date and waived his right to a speedy trial.[9]

The court granted a continuance of the trial date to December 6, 2012, and set a new child hearsay hearing for November 9, 2012.[10] The State extended the deadline for accepting the guilty plea until the day of the plea

[8] *See* CP 123-127 (State's Response). Because the prosecutor who handled Mr. Juntunen's trial case also handled Mr. Juntunen's motion to withdraw a plea, she did not testify. Thus, the defense will cite the State's response motion, which contains the prosecutor's version of the facts, as if she testified to those facts during the hearing.
[9] *See id.*
[10] *Id.*

hearing and threatened to revoke the offer if defendant did not accept the State's offer before that hearing.[11]

Despite this threat, defense counsel waited until November 8, 2012, the day before the scheduled child hearsay hearing to travel to the victim's home to interview the victim. This was the first and only time, as defense counsel would later admit, that Baum interviewed any witnesses face-to-face.[12] In fact, in response to the State's trial poster, Baum took no action whatsoever. He did not subpoena any defense witnesses, he never filed a response to the State's motion to admit the victim's child hearsay statements, nor did he file any other substantive motion with the court.

Ultimately, on November 11, 2012, Mr. Juntunen pleaded guilty to a mandatory minimum sentence of 25 years.[13] At the sentencing hearing, held a few weeks later, the court followed the parties' recommendation and sentenced Mr. Juntunen to a mandatory minimum sentence of 2 years.

C. BAUM'S DECLARATION FOR PAYMENT

On May 13, 2013, six months after Mr. Juntunen pleaded guilty, Baum filed a declaration with the trial court, in which he asked the court to pay him for the work he did on Mr. Juntunen's case.[14]

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[11] *Id.*
[12] *See* Baum's Testimony. RP at 65-69 (2.14.14)
[13] CP 34.
[14] CP 75-58.

In his declaration, Baum claimed that he worked a total of 62.6 on Mr. Juntunen's case and asked the court to pay him nearly $5,000 for that work.[15] To justify his payment, Baum made numerous claims about the work he did on Mr. Juntunen's case that are relevant for this appeal.

Baum wrote in the declaration, for example, that he spent over three and a half hours "searching for an expert" to evaluate the State's DNA evidence, even though one was never retained, either as a consulting expert or otherwise.[16] Though he claimed that he "filed" a motion to obtain public funds for an expert, which he said was "denied" by the trial court, the trial court docket reveals that no such motion was ever "filed" with the court.

Baum claimed that he worked 62.6 hours on Mr. Juntunen's case. Baum told the court that he believed that this was "a reasonable fee" for the hours he worked when he asked the court to pay him $4695.[17]

D. **MOTION TO WITHDRAW PLEA**

On February 14, 2014, a hearing regarding defendant's motion to withdraw his guilty plea was held before the Honorable R. Brosey.[18] The Defendant was present with his attorney of record, Mitch Harrison; the State was represented by Deputy Prosecuting Attorney Joely O'Rourke.[19] The

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] RP at 1 (2.14.14)
[19] *Id.*

Court considered arguments of both parties and the testimony of defendant's court appointed trial attorney, Christopher Baum.[20]

Although Mr. Juntunen waived his attorney client privilege so Mr. Baum could testify, the trial court also stated that it would "be ordering Mr. Baum to testify" even if Mr. Juntunen did not do that:

> Lest there be any other misunderstanding, for the record, Mr. Juntunen is waiving his attorney-client privilege, with respect to communications, between himself and Mr. Baum, but I'm also interested in knowing what happened here, with respect to the process that led up to the time that this plea was entered, because the allegations that have been raised here are serious allegations and are claims assertions that go well beyond what happens here today in this trial court, depending upon the ruling that I make, so I would be ordering Mr. Baum to testify in any event.

1. **Baum's Testimony**

Baum testified that he has worked in Lewis County for his entire 12 year career as a lawyer.[21] For six of those years, he worked as a deputy prosecutor for Lewis County Superior Court.[22] Since then he had been doing private defense work within Lewis County.[23] That private defense work included, as with Mr. Juntunen's case, handling publically appointed cases in Lewis County Superior Court. Also, while Mr. Juntunen's case was pending, Baum

[20] *Id.* at 38.
[21] *Id.* at 38-39.
[22] *Id.*
[23] *Id.*

testified that he was also working as a prosecutor for the city of Vader, located within Lewis County.[24]

Baum testified that he was appointed to handle Mr. Juntunen's current case in the summer of 2012.[25] Baum testified that, during their first meeting, Mr. Juntunen admitted that he was, in fact, present at the scene of the crime, and he did engage in sexual contact with the victim.[26] Though Mr. Juntunen told Baum that he was present at the scene, and engaged in some kind of sexual contact with the vicitm, Mr. Juntunen adamantly denied many of the facts that were charged in the information, and also provided Baum with several mitigating facts. Mr. Juntunen, for example, denied ever using a weapon, contrary to the original charges.[27] He also denied that there was any penetration of any kind.[28]

Baum also testified about the victim's inconsistent statements about how the sexual contact occurred:

> This was a discussion that he and I had quite a bit during the course of this case, because I talked to him about the statements by the victim, because the statements made five years prior were different from the statements made five years later, when the detective went back to interview her. She was five years-older, I think 13 during the second interview, and there were differences in how she was taken into the bathroom.

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[24] *Id.*
[25] *Id.* at 40.
[26] *Id.* at 44.
[27] *Id.*
[28] *Id.*

> One statement had her taken in by force into the bathroom. The other statement she was contacted in the bathroom. We talked about that. We talked about the penetration vs. sexual contact. The initial statement that she made was sexual contact, just rubbing on the outside. There was no real mention of penetration, but in her second statement -- I think it was Callas that did the statement with her -- she talked about penetration and pain and some other things. These were significant differences that Mr. Juntunen and I talked about.[29]

Baum then testified that he explained to Mr. Juntunen that "the only real defense he had would be attacking" the victim's credibility based upon he inconsistent statements.[30] But, because Baum believed that she was credible, he suggested to Mr. Juntunen to not take the case to trial.[31]

Baum then testified about his investigation into the DNA evidence. He testified that He "spent a lot of time looking at the legal issues surrounding DNA." He explained, without elaboration, that "the warrant was solid for his DNA." He also admitted that there "was one issue relating to" the DNA, which was matched by a "hit" through "the CODIS mainframe."[32]

Baum explained that he was concerned about this DNA issue for several reasons. First, Baum testified, that it was strange that the CODIS hit came five years after the incident, even though Mr. Juntunen's DNA had been in CODIS for several years.[33] Second, Baum testified that he was concerned

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[29] *Id.* at 45 – 46.
[30] *Id.* at 46.
[31] *See id.*
[32] *Id.* at 48.
[33] *Id.*

about "contamination" issues with regard to the DNA, which could have arose with the way in which the DNA was collected.[34] Notably, Baum knew that the DNA was collected from a tissue that had to be retrieved from a garbage can in a comping trailer, away from the scene of the crime.[35]

Though Baum recognized that these issues presented potential "legal issues surrounding the DNA," he claimed that "there wasn't really any way of getting around" them.[36] He based this conclusion, almost exclusively off his conversations with the State's DNA "analyst at Vancouver."[37] Baum testified that he "spoke with her at length," but because "she said there was no issues whatsoever as to contamination or issues related to the DNA sample," he apparently decided to look no further.[38] Without obtaining public funds for a defense expert, Mr. Baum apparently trusted the State's expert, without question, to conclude that the DNA sample "was *seemingly* collected without issue."[39]

Baum then explained that he was going to have the DNA evidence analyzed, but after the trial court denied his request for an out-of state expert, he had a sudden, unexplained change of heart:

> In any event, the match to him was uncontroverted then his own admission to me that he had done this kept me from going

[34] *Id.*
[35] *Id.*
[36] *Id.* at 47.
[37] *Id.* at 49.
[38] *Id.*
[39] *Id.* (emphasis added).

> after the DNA, because I initially was going to have the DNA analyzed, but chose not to, because I think it ultimately would have produced an additional witness against him, so that's why I didn't follow-up on the additional DNA expert.[40]

Thus, without first obtaining an independent expert's opinion about the DNA evidence—which was the only evidence linking Mr. Juntunen to the charged crimes—Baum advised Mr. Juntunen that he would almost certainly be convicted at trial. Baum testified as follows:

> I thought it a was high likelihood [Mr. Juntunen] could be convicted, because I couldn't find a decent defense then the risk of a tremendous sentence weighing meand he and I talked about this at great length.

Baum testified that he did not put together any type of mitigation package. He did not do this, Baum admitted, because he did not go to trial:

> The problem with going to trial on this case is the risk to Mr. Juntunen was a tremendous amount of time, depending what would happen, so since we did not go to trial, I did not try to put together a mitigating package, because he did plead to apredatory aggravator, which has a 25 to life standard range by statute.[41]

In other words, Baum decided not to put together ta mitigation package, i.e. to ask for a reduced sentence, because he instead encouraged Mr. Juntunen to plead guilty without one.

Finally, on cross examination, defense counsel asked Baum numerous questions about the work Baum performed in Mr. Juntunen's case,

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[40] *Id.*
[41] *Id.* at 60.

specifically focusing on a "billing sheet" Baum filed with the court, which he filed under the penalty of perjury.[42]

When questioned about that billing sheet, Baum was unable to provide any insight on the specifics for most of the hours he claimed to work. For example, when confronted with the glaring inconsistencies between his declaration, Baum's memory, and the work actually done in Mr. Juntunen's case, Baum's answers frequently resembled this conversation:

> **Baum**: No. I think I called some of other witnesses listed in the police report, because in this case they were trying to identify Mr. Juntunen, so they were talking to other people, so I made calls related to some of the other names that were listed in the report and I honestly can't remember if I talked to them or not.
>
> **Defense Counsel**: If you didn't talk to them, that really doesn't take up much of the time you actually spent on this, then; correct? Just be a call and a message, maybe no call back?
>
> **Baum:** I cannot -- this is a while ago. I can't remember specifically how much time I spent on that.[43]

Further, Baum also failed to provide any type of work product, i.e. legal notes or written motions, to substantiate the hours he claimed to have worked in his billing sheet. On one occasion, Baum was able to provide some documentation for the work he claimed to do in Mr. Juntunen's case: when questioned about why he did not ultimately hire defense DNA expert, Baum

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[42] *See* Section "C" *supra.*
[43] *Id.* at 64.

produced a CV for an out-of-state expert from California, a Dr. Monte Miller.[44] Baum then claimed that he presented a motion to another Superior Court Judge ("Judge Hunt") in Lewis County, but then admitted that he "didn't file the motion."[45]

When asked whether the victim, could identify Mr. Juntunen as her assailant, Baum admitted that she couldn't:

> She couldn't identify him, and I asked her that when I did the interview, and I think in the statements she couldn't physically identify him, and when I talked to her she still couldn't identify him.[46]

In fact, Baum also admitted that, even after the so-called "positive" DNA hit, he had initially tried to call several "witnesses listed in the police report, because in this case they were trying to identify Mr. Juntunen."[47] Yet, despite the DNA evidence being the *most crucial* part of the State's case, Baum inexplicably failed to retain an expert to at least evaluate that evidence. Baum explained, on cross, why he decided to not challenge the DNA evidence:

> **Defense Counsel:** So then the DNA evidence would be the most crucial piece of evidence in this case?
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> **Baum:** Absolutely.
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> **Defense Counsel:** But you decided to not to challenge it? For the reasons I stated.

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[44] *Id.* at 65, 69.
[45] *Id.*
[46] *Id.* at 72-73.
[47] *Id.* at 64.

> **Defense Counsel:** I don't want to paraphrase you, but I believe the reasons so far include, because Reggie admitted he did it and because the Court denied an out-of-state expert; is that correct?
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> **Baum:** Well, then, I felt that it would just produce additional evidence against him.
>
> **Defense Counsel:** What was the scientific basis for that?
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> **Baum:** *Well, I don't know, if I need a scientific basis. When my client says he did it, then, I have a DNA lab report saying it matches to his DNA, I mean, I think common sense.*[48]

2. **Defense Arguments Pertaining to the DNA Evidence and Ineffective Assistance of Counsel.**

Based upon this testimony, defense counsel argued that the court should reject Baum's testimony as not credible on many issues, including his claims that he spent over 60 hours working on Mr. Juntunen's case, despite the obvious lack of any work product to prove that such work was done. Defense counsel also argued that, even if Baum was credible, he was still ineffective, most notably for simply giving up on his efforts to obtain a defense expert simply because he thought Mr. Juntunen was guilty:

> It seems to me that Mr. Baum assumed it was going to be a positive hit, without challenging it, and that to me is a real misstep. The reasons that he gave for not doing the DNA analysis with an expert are particularly troubling to me, essentially, that he didn't consult with a DNA expert, because his client told him he did it. That's not really enough. I think anybody that's worked on DNA cases like Mr. Baum should[,] know that just because someone did it doesn't mean a DNA sample can't be tainted or suppressed, and that doesn't -- I don't think that conclusion really -- and his second reason

[48] *Id.* at 73.

> for not doing it is because the Court apparently denied a motion that was never submitted before it for an out-of-state expert, and Mr. Baum couldn't give a real reason for not consulting with one in-state.
>
> He said he's also fearful a DNA evidence would corroborate the State's story, but that doesn't really add up to me, either, because if you can get that suppressed, if the DNA expert says it was mishandled or something, it is suppressed, then, you don't have anything linking Mr. Juntunen to the crime.
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> And it doesn't matter how well the witness testifies, she admitted to him that she couldn't identify him. Those things cause great concern for me.

3. **The Trial Court's Denial of the Motion**

After hearing argument from counsel, the trial court denied the defendant's motion to withdraw his plea, ruling that Mr. Juntunen failed to meet his burden to show that Baum's performance during plea negotiations was deficient under *Strickland.* Relatedly, the trial court concluded that Mr. Juntunen's plea was knowing, intelligent, and voluntary and did not constitute a manifest injustice under CrR 4.2.

In support of these legal conclusions, the trial court entered the following findings of fact, which are relevant for this appeal:

> 1.9 Baum *testified* he spent 62.6 hours working on defendant's defense.[49]

[49] Interestingly, the trial court appeared to actively avoid making any finding on whether this testimony, at least with regard to the number of hours Baum claimed to put into the case, was credible or even plausible. No finding of fact sheds light on the trial court's opinion about the credibility of this claim. *See* CP 184-188 (FFOCAL).

1.10 Baum went to visit defendant in the Lewis County Jail on ten different occasions.[50]

1.11 During their first jail visit, defendant admitted to Baum that he forced the victim into the bathroom by threat of a knife, had sexual contact with her and then ejaculated on her. Defendant clarified that he did not in fact have a knife, but stated that the victim believed he did. Defendant explained he was a virgin at the time of the offense and went to the park that day wanting to have sex. Defendant also informed he was addicted to controlled substances at the time of the offense.

1.12 Baum's legal representation was handicapped by the admission of the defendant at their first meeting.

1.15 Baum met with the Deputy Prosecutor on several occasions on behalf of his client, but was unable to negotiate a plea to a lesser charge, which may have resulted in a lesser sentence.

1.18 Baum conducted interviews with the Washington State Patrol Crime Lab and other DNA experts. Baum was unable to discover any legal issues regarding collection, custody or testing of the DNA evidence in this case.

1.19 Baum's oral request for county funds for the hiring of a DNA expert from California was denied by Superior Court Judge Nelson Hunt, who advised Baum to seek such an expert from the State of Washington.

1.20 Baum strategically decided against obtaining a DNA expert, which based on defendant's admission, Baum believed would only corroborate the State's case against his client.[51]

IV. ARGUMENT

A. SEVERAL OF THE TRIAL COURT'S FINDINGS LACK SUFFICIENT FACTUAL SUPPORT IN THE TRIAL COURT RECORD. ENTERING THESE

[50] This finding necessarily means that Baum lied or at least lacked a factual basis to believe that he visited Mr. Juntunen 14 times while he was incarcerated.
[51] CP 184-188 (FFOCAL).

FINDINGS WAS AN ABUSE OF DISCRETION, THUS, THEY ARE NOT BINDING ON REVIEW.

An order denying a motion to withdraw a plea must be supported by findings of fact and conclusions of law.[52] Each finding of fact must be supported by reliable evidence that is (1) presented at hearing on the motion to withdraw the plea,[53] and (2) are sufficient to persuade a reasonable person that the finding was in fact true.[54]

In *A.N.J.*, the trial court based its findings in part on the defendant's out-of-court statements, which it took directly from police reports, rather than those made during the motion hearing, to ultimately find that the defendant "accepted the State's version of the alleged facts" as true. But the Supreme Court struck down this finding, recognizing that the "finding [was] not consistent with anything that A.N.J. himself said or did at any point in the proceedings other than making the plea itself. A.N.J. did not make a statement at the plea hearing."[55] As a result, the court held that this finding, along with several others, lacked substantial evidence in the record, and was not binding on review.[56]

The trial court here made the same mistake made by the trial court in

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[52] *State v. A.N.J.*, 168 Wn. 2d 91, 107, 225 P.3d 956, 964 (2010).
[53] *Id.* (holding that finding was an error when it was "not consistent with anything that A.N.J. himself said or did at any point in the proceedings other than making the plea itself.").
[54] *Id.*
[55] *Id.*
[56] *See id.*

A.N.J. FoF 1.2 makes several claims that lack reliable support in the record. Apparently taking the language from the charging document, this finding claims that S.E.H. was lured into a bathroom where the molestation occurred. The victim never testified at the hearing however, and the information, like this, which relies solely upon hearsay within hearsay, should not be accepted as true for purposes of the motion to withdraw a plea.[57] Further, it also claims that the suspect in this case "rubbed" the victim's vagina. That fact was never established and lacks support in the record. None of these facts, therefore, should have been accepted as true.

FoF 1.3 claims that the suspect put a white substance (implying it was semen) on the victim's vagina. No testimony supports this finding. Mr. Juntunen did not testify at all. Further, Baum did not testify that Mr. Juntunen told him that he put any semen on the victim's vagina. Finally, the victim gave grossly different descriptions to different individuals about what happened. The trial court had absolutely no factual basis to conclude that the suspect "put something on [the victim's] vagina."

FoF 1.20 claims that "Baum strategically decided against obtaining a DNA expert, which based on defendant's admission, Baum believed that hiring a DNA expert would only corroborate the State's case against his client." Mr. Juntunen does not object to the finding that Baum decided against

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[57] *See id.*

obtaining a DNA expert, nor does he object to the finding that Baum believed that an expert would not be helpful. Mr. Juntunen does, however, object to the court's conclusion that this decision was a reasonable "strategic" decision under *Strickland*, which is a legal question this court reviews de novo.[58]

FoF 1.32 claims that Mr. Juntunen "did not present any evidence beyond the self-serving allegations of his mother to show that his guilty plea was not voluntarily made." This finding lacks evidence in the record and is improper to the extent that it implies that the statements made by Mr. Juntunen's family are automatically "self-serving" and not credible. The finding is also incorrect to the extent that it may imply that the testimony of Baum did not support Mr. Juntunen's allegations of ineffective assistance of counsel.

Though a trial court's findings are reviewed under a deferential standard (abuse of discretion), the record before this court fails to allow a fair-minded and rational person to conclude that many of the trial court's findings of fact were in fact true.[59] As such, they are not binding on this court and do not preclude this court from making an independent review of the record regarding those facts.

B. BAUM FAILED TO SUBJECT THE STATE'S CASE TO ANY MEANINGFUL ADVERSARIAL TESTING

[58] *See id.* and the arguments in the proceeding sections below.
[59] *See id.*

The right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."[60] Put another way,

> When a true adversarial criminal trial has been conducted—even if Defense Counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."[61]

Ordinarily, once counsel's deficient performance is established, the defendant must also show that the deficient performance resulted in prejudice.[62] Indeed, the requirement for an attorney's specialized knowledge and training is so vital that where appointment of counsel is required by the Constitution, "an outright denial of counsel is conclusively presumed to be prejudicial."[63] In such a circumstance, the defendant need not be actually denied counsel; it is enough that counsel performs so poorly that the defendant might as well have represented himself.[64]

Some circumstances are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.[65] To determine whether to presume prejudice, the court must ask itself "whether the

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[60] *United States v. Cronic*, 466 U.S. 648, 656-57 (1984)).
[61] *Id.*
[62] *Strickland v. Washington,* 466 U.S. 668, 687 (1984).
[63] *City of Seattle v. Ratliff*, 100 Wn.2d 212, 219, 667 P.2d 630 (1983).
[64] *Strickland,* 466 U.S. at 692 (citing *Cronic*, 466 U.S. AT 659 & n.25).
[65] *Id.* at 658.

circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time."[66] Those circumstances include cases where "counsel entirely fails to subject the prosecution's case to *meaningful* adversarial testing," which "makes the adversary process itself *presumptively unreliable.*"[67] In order to presume prejudice based on counsel's failure to subject the State's case to meaningful adversarial testing, "the attorney's failure must be complete."[68]

For example, in *Swanson*, the court found that when an attorney acknowledges defeat on one element of a charge and admits that there is no reasonable doubt that the defendant was the perpetrator, then the petitioner is not required to demonstrate prejudice.[69] The court reached this conclusion because the attorney in that case conceded the only disputed factual issues.[70]

Here, just as in *Swanson*, Defense Counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Mr. Baum, did not subject the State's case to any meaningful adversarial testing. Obviously, one of the core concerns in Mr. Juntunen's case was the 25 year aggravator alleged by the State. Even if this aggravator was validly charged, Mr. Baum still owed Reggie a duty to test the strength of the State's case in an effort to

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[66] *Wright v. Van Patten,* 552 U.S. 120, 125 (2008) (per curiam)
[67] *Strickland,* 466 U.S. at 659, emphasis added.
[68] *Bell v. Cone*, 535 U.S. 685, 696-97 (2002).
[69] *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991).
[70] *United States v. Thomas*, 417 F.3d 1053, 1058 (9th Cir. 2005).

negotiate a reasonable plea deal for Reggie. The aggravator stood directly in the way of obtaining a reasonable plea offer for Reggie, but Mr. Baum utterly failed to subject the State's case to adversarial testing so as to encourage the State to drop the aggravator, even though there were numerous holes in the State's case.

Without that aggravator, Mr. Juntunen's standard range sentence would be around 10 years. The aggravator more than doubled his sentence. Reggie's lawyer essentially conceded the case by telling Reggie to plead guilty to a 25-year minimum sentence, telling Reggie that the aggravator was going to "stick." Like in *Swanson*, attacking the aggravators in Reggie's case was absolutely crucial to mounting any kind of defense to the allegations made by the State. Yet, the trial record reveals that Mr. Baum filed no motions to attack the legality of the aggravator. It also reveals that Mr. Baum failed to present any mitigating evidence in Reggie's defense.

In addition to failing to allow Reggie to undergo some basic tests that would have tested the State's evidence, Mr. Baum did not take advantage of the inconsistencies in the witness's statements. This omission is especially troubling because the complaining witness made several statements that had key inconsistencies. The failure to use this key inconsistency in the bargaining process constituted a failure to subject the State's evidence to the adversarial process.

Also, Baum made no meaningful efforts to negotiate a better deal than what the State initially offered. The State initially offered Reggie a twenty-five year sentence. This is stunning, considering that the presentence report recommended only a 96 month (eight year) period of confinement.[71] It seems as though Reggie would have been better off if instead of Mr. Baum's assistance, he just had a copy of the presentence report with which to negotiate with the prosecutor.

Defense counsel utterly failed to develop a potential defense at trial, even though several potential options certainly existed. Defense counsel could have, for example, exploited the inconsistencies in the victim's statements and argued that no molestation occurred. But most notably, Baum did not hire an independent expert to evaluate the most crucial piece of evidence in the case: the State's DNA evidence, which was the sole link between Mr. Juntunen and the charged crime.

Mr. Baum was also ineffective in failing to obtain a DNA specialist, as he promised Reggie he would do. Reggie was initially identified as a suspect because his DNA was found on a piece of evidence. The DNA was the prominent piece of evidence connecting Reggie to the crime and because that evidence was over five years old, it was essential for the defense to have an expert analyze the evidence. Mr. Baum recognized the importance of a

[71] CP 47-55.

DNA analysis because he initially told Reggie that he wanted to bring in a DNA specialist to analyze the evidence. Instead of ordering an assessment of the evidence as he had originally suggested, Mr. Baum left the evidence unchallenged.

Although Baum testified that the DNA evidence was "collected without issues," he could not elaborate on what investigations he did into the collection. This is significant because exactly how the DNA sample was collected was clearly an issue in dispute. The trial court's findings of fact state that S.E.H. "wiped the white substance off with a tissue" after she left the bathroom and went back to her parents camper.[72] Baum, on the other hand, testified that someone had to retrieve the tissue from a garbage can in the park.[73] Despite this inconsistency, Baum did nothing to challenge the DNA based upon chain of custody, or through any of plausible legal challenge.

Finally, Baum's complete failure to advance Mr. Juntunen's best interests is animated by the false statements Baum included in his declaration to the court for payment on Mr. Juntunen's case. In that declaration, Baum claimed that he visited Mr. Juntunen in Lewis County Jail a total of 14

[72] CP 185.
[73] RP 48.

times.[74] But, as pointed out to Baum in the motion hearing the official jail records from Lewis County proved that Baum had only visited Mr. Juntunen a total of 10 times, not 14 as Baum swore in his declaration.

When given the opportunity to explain this discrepancy, Baum lied again in court, claiming that the other four jail visits were "after hours" visits and the Jail does not keep records of those visits. But as shown in the trial court's findings of fact, specifically FoF 1.10, this excuse was not credible, and the court rejected it, finding instead that Mr. Baum only visited Mr. Juntunen 10 times.

Given these numerous failures, Baum's minimal efforts and his apparent dishonesty to the court, he failed to advance any of Mr. Juntunen's real interests throughout the plea process, nor did his subject the State's case to any *meaningful* adversarial testing. Most notably, he failed to take advantage of the complaining witness's inconsistent statements and did not obtain an independent evaluation of the State's DNA evidence. Therefore, Reggie's assistance of counsel fell below an objectively reasonable standard. And because he failed to subject the State's case to any meaningful adversarial testing, Reggie need not show prejudice.

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[74] Those dates include the following: 7/29/12 (1.1 hours), 8/2/12 (less than 1.5 hours), 8/8/12 (less than 3.5 hours), 8/24/12 (less than 2.5 hours), 8/31/12 (less than 3.1 hours), 9/21/12 (less than 2.9 hours), 10/19/12 (less than 3.1 hours), 10/26/14 (less than 2.5 hours), 11/2/14 (less than 2.6 hours), 11/9/12 (less than 1.6 hours), 11/16/12 (0.6 hours), 1126/12 (0.8 hours), 12/7/12 (less than 3.6 hours), 12/12/12 (1.5 hours). CP 75-78.

C. MR. JUNTUNEN'S GUILTY PLEA IS INVALID BECAUSE IT WAS MADE WITHOUT THE EFFECTIVE ASSISTANCE OF COUNSEL.

1. Standard for Ineffective Assistance of Counsel

Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution.[75] This right extends to counsel performance throughout the plea process.[76] The Standard For Determining Ineffective Assistance of Counsel.

Strickland's two part test for ineffective assistance of counsel applies to the plea process.[77] Under that standard Mr. Juntunen must show that counsel's performance was deficient — that it fell below an objective standard of reasonableness — and that the deficient performance was prejudicial.[78] The proper measure of attorney performance is reasonableness under prevailing professional norms.[79]

To demonstrate prejudice, Mr. Juntunen must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.[80] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[81] The

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[75] *Strickland,* 466 U.S. at 668.
[76] *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).
[77] *Lockhart*, 474 U.S. at 57 (holding that the same test for determining ineffective assistance of counsel at trial "seems to us applicable to ineffective-assistance claims arising out of the plea process").
[78] *Id.* at 687-88.
[79] *Id.* at 688.
[80] *Id.* at 694.
[81] *Id.*

"reasonable probability" standard is not stringent,[82] and requires a showing by less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated.[83]

CrR 4.2(f) requires the trial court to grant a timely motion to withdraw a plea "whenever" the defendant can shown a plea made without the benefit of the effective assistance of counsel.[84] If the motion is denied, as it was here, the trial court's ruling on the effectiveness of counsel is reviewed "de novo."[85]

2. **Baum was Required to "actually and Substantially Assist" Mr. Juntunen throughout the plea process so that he could made an informed decision before pleading guilty.**

An attorney's bedrock obligation is to "serve as the accused's counselor and advocate."[86] In the plea context, as the defendant's counselor and advocate, defense counsel must "actually and substantially" assist the defendant in pleading guilty.[87] To achieve this bare minimum of competence, counsel must first "make an independent examination of the facts,

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[82] A "reasonable probability" is less than a preponderance: "the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

[83] *See, e.g., Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002), cert. denied, 539 U.S. 916 (2003), *quoting Strickland*, 466 U.S. at 694.

[84] *See* CrR 4.2(f) and *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996).

[85] *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

[86] ABA Standards for Criminal Justice: Prosecution and Defense Function 4-1.2(b) (3d ed. 1993) [hereinafter ABA Standards],

[87] *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) (citations omitted).

circumstances, pleadings and laws involved, and then to offer his informed opinion as to what plea should be entered."[88]

Counsel's duty to his client is therefore a two-step process. In the first step, counsel must independently investigate all reasonable lines of defense. This investigation allows counsel to assist the defendant by presenting him with "the alternatives of action" available under the facts and law.[89] Second, following that investigation, counsel must use that information to provide accurate and complete advice so the defendant makes an "informed and conscious choice" to plead guilty.[90]

At a minimum, counsel must provide complete and accurate advice regarding (1) any plea offers made by the State,[91] (2) the "advantages and disadvantages of [accepting] a plea agreement,"[92] and (3) the likelihood of conviction if the defendant went to trial.[93] The failure to perform any of these most basic duties, as the U.S. Supreme Court has held, will frequently result in the denial of the effective assistance of counsel.[94]

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[88] *Von Moltke v. Gillies,* 332 U.S. 708, 721 (1948).
[89] *Id*
[90] *Id.*
[91] *Lafler v. Cooper*, 132 S. Ct. 1376 (2012)
[92] *See Libretti v. United States*, 516 U.S. 29, 50 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement...."); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *See, e.g., Padilla v. Kentucky*, 559 U.S. 356 (2010) (deportation consequences);
[93] *Lafler,*, 132 S. Ct. at 1384 (finding counsel's performance was deficient because "he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.")
[94] *See* cases cited in the previous footnotes above.

3. **Baum's Truncated Investigation—specifically his failure to hire and consult with a Qualified Defense Expert—was Insufficient to Allow Mr. Juntunen to Make an Informed Decision About Pleading Guilty. This Failure was Deficient & Prejudicial under *Strickland.***

A guilty plea is only valid under Due Process if it is knowing, intelligent, and voluntary.[95] A plea is voluntary if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[96] In this context, defense counsel must "actually and substantially assist" the defendant.[97] Counsel's efforts must, at a minimum, ensure that the defendant can make a "voluntary and intelligent choice among the alternative course of action open to the defendant."[98] In *Estelle*, the Fifth Circuit summarized the general duties of counsel as follows:

> It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. He must *actually and substantially* assist his client in deciding whether to plead guilty. It is his job to provide the accused an '*understanding of the law in relation to the facts*.' The advice he gives need not be perfect, but it must be reasonably competent. His advice should *permit the accused to make an informed and conscious choice.* In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary *because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimal level.*[99]

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[95] U.S. Const. amends. V, XIV. *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969).
[96] *United States v. Kaczynski*, 239 F.3d 1108, 1114 (9th Cir. 2001).
[97] *State v. Cameron*, 30 Wn. App. 229, 633 P.2d 901 (1981), review denied, 96 Wn. 2d 1023 (1981).
[98] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (standard for valid plea)
[99] *Estelle*, 491 F.2d at 128.

Before a defendant can make an "informed and conscious decision" to plead guilty, counsel must, in virtually all cases, investigate reasonable lines of defense so that he is "familiar with the facts and law relevant to his client's case."[100] After that investigation, counsel's advice must accurately communicate the following information to the defendant: (1) any plea offers made by the State,[101] (2) the "advantages and disadvantages of [accepting] a plea agreement,"[102] and (3) the likelihood of conviction if the defendant went to trial.[103]

Defense counsel's investigation into the facts and law plays a vital role in making sure this happens. The need for adequate investigation prior to recommendation of a guilty plea is well established.[104] As the Court observed in *A.N.J.*, defense counsel "cannot properly evaluate the merits of a plea offer without evaluating the State's evidence" Instead, counsel must

> at the very least . . . *reasonably evaluate the evidence against the accused* and *the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.*[105]

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[100] *Id.*
[101] *Lafler*, 132 S. Ct. 1376.
[102] *See Libretti*, 516 U.S. at 50 ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement...."); *Missouri v. Frye*, 132 S. Ct. 1399 (2012)
[103] *Lafler*, 132 S. Ct. at 1384
[104] *See State v. A.N.J.*, 168 Wn.2d 91, 109-112, 225 P.3d 956 (2010).
[105] *Id.*

a) Mr. Juntunen has a constitutional right to hire a consulting DNA expert, at public expense.

Indeed, defendants have a constitutional right to an expert, paid for at public expense, whenever it could be needed to address a "significant factor at trial.[106] Here, Baum seemed to believe that this constitutional right was meaningless in this case, based upon his own legal conclusion that Mr. Juntunen "did it," or because it was not obvious to him that a DNA expert would have been able to cast doubt on the State's expert's conclusion that Mr. Juntunen's DNA "matched" that found at the scene.

But, that is exactly why defense attorneys employ consulting experts: to provide them with expertise in scientific areas that most attorneys do not understand. In fact, CrR 6.13(c)(1), which requires the State to provide such funds for consulting experts, illustrates this reality, and allows defense counsel to obtain funds to hire a consulting expert, even when defense counsel cannot assure the court that the results will be favorable.

> Counsel may not know precisely what expert testimony will be offered - or whether the testimony will ultimately be admissible - before the expert has been appointed. In these cases, it is unrealistic to require the defendant to establish, prior to appointment of the expert, foundational prerequisites for admission of the testimony.[107]

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[106] *See Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 1096, 84 L.Ed.2d 53 (1985) (the Court held that where a defendant demonstrates that his sanity would be a "significant factor at trial", the State must, at a minimum, provide the defendant with access to a competent psychiatrist to assist in his defense).

[107] *City of Mount Vernon v. Cochran,* 70 Wn. App. 517, 526, 855 P.2d 1180, 1185 (1993)

b) Hiring a consulting DNA expert and using him to evaluate the State's DNA evidence was "the only reasonable and available defense strategy." Under controlling U.S. Supreme Court precedent, Baum's failure to obtain such an expert was deficient as a matter of law.

The use of defense experts is now more common than ever. In *A.N.J.*, the Court recognized that "depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant."[108]

In fact, the U.S. Supreme Court has twice held that, in certain cases, consulting with an expert may be "the only reasonable and available defense strategy."[109] Thus, when forensic evidence constitutes the core piece of evidence against the defendant, defense counsel must, at the very least, employ an expert to independently evaluate that evidence. The failure to do so is ineffective assistance of counsel.[110] In *Hinton*, the Supreme Court held that it was "unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but

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[108] *Id.*

[109] *Hinton v. Alabama*, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014) (unreasonable for lawyer to not seek additional funds to hire an expert based upon a misunderstanding of the law); *Harrington v. Richter,* 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011).

[110] *See, e.g., Pavel v. Hollins*, 261 F.3d 210, 223 (2d Cir. 2001) (In a child abuse case, defense counsel's "performance was deficient to the extent that he did not call a medical expert to testify as to the significance of the physical evidence presented by the prosecution."); *Lindstadt v. Keane*, 239 F.3d 191, 20102 (2d Cir. 2001) ("In sum, defense counsel's failure to consult an expert [and] failure to conduct any relevant research ... contributed significantly to his ineffectiveness"; defense attorney failed to obtain either the "Boston study" used by prosecution expert, and he failed to consult with an expert before trial about the prosecution's physical evidence).

on a mistaken belief that available funding was capped at $1,000." [111]

Here, although Baum initially sought public funds for a consulting DNA expert, he inexplicably reversed course when the State denied his off-the-record motion for public funds. He later explained in the motion to withdraw the plea that he decided against using an expert because he did not want the State to have access to the witness, who could have, *at least theoretically not been favorable to the defense.*

But, counsel was clearly unaware that CrR 3.1(f) not only entitled Mr. Juntunen to a qualified DNA expert at public expense, but it also entitled him to (a) submit the motion ex parte, as Baum claimed he did, and (b) have that request sealed by the court. That rule, in pertinent part, provides:

> (f) Services Other Than a Lawyer.
>
> (1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.
>
> (2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services. The motion may be made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could

[111] *Hinton*, 134 S. Ct. at 1088.

not await prior authorization, shall ratify such services after they have been obtained.[112]

As the court observed in *Hinton,* "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence."[113] Just as in *Hinton*, "[t]his was such a case." Here, just as defense counsel in *Hinton*, Baum "recognized [that] the core of the prosecution's case was the state experts' conclusion," yet he failed to obtain readily available funds to hire an expert to evaluate that conclusion.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*"[114] In *Hinton*, defense counsel knew that a defense expert could have cast doubt on crucial forensics evidence but failed to obtain one, based upon his incorrect legal conclusion that no money was available to obtain one.

Similarly, here, Baum failed to hire an expert because he was completely unaware that CrR 3.1 allows the court to seal his motion for public funds and protect the identity of his consulting expert. Though it is true that the State may *later* gain access to expert, if the case goes to trial, that

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[112] CrR 3.1(f)
[113] *Hinton*, 134 S. Ct. at 1088.
[114] *Id.*

consideration is irrelevant here, because Mr. Juntunen pleaded guilty.

In fact, Baum's failure to hire an expert here was even worse than the failure in *Hinton*, where the defense attorney already had his own expert, albeit one who was much less qualified than the State's expert. Here, on the other hand, Baum employed no expert, even though a successful challenge to the DNA could have resulted in dismissal of all charges against his client.

Under *Hinton*, Baum's decision to not hire an expert, on the basis of his misunderstanding of CrR 3.1 was a clear and unmistakable error of law. Under *Hinton*, this failure constitutes deficient performance under *Strickland.*

> c) *Because the record shows that counsel failed to adequately investigate vital facts of the State's case, namely the propriety of the DNA evidence, the presumption of effectiveness does not apply.*

Though courts will initially indulge in a "strong presumption" that counsel's performance was reasonable, that presumption fails when counsel has told his client to plead to an offense without a proper and thorough investigation.[115] Here, this is exactly what happened. Thus, that presumption has no bearing in this case.

> d) *Mr. Juntunen's admission of guilt is not a reasonable excuse for Baum's failure to hire a consulting DNA expert.*

[115] *See Woodward v. Collins*, 898 F.2d 1027, 1029 (5th Cir. 1990).

Despite Baum's utter failure to file a formal motion, the trial court found, in FOF 1.19, that Baum did in fact make such a request. But, it also found that the trial court only denied that request because Baum's purported expert was from out-of-state:

> Baum's oral request for county funds for the hiring of a DNA expert from California was denied by *Superior Court Judge Nelson Hunt, who advised Baum to seek such an expert from the State of Washington.*

Baum, however, ignored Judge Nelson's advice, however. Instead, despite the numerous hours Baum claimed to spend *searching for* an expert, Baum inexplicably just gave up on retaining a DNA expert altogether.

Despite these inconsistent positions, the trial court still ruled that Baum's sudden decision to stop pursuing a DNA expert was reasonable, citing Mr. Juntunen's admission of guilt as the only credible reason. In FOF 1.20, the Court said:

> Baum strategically decided against obtaining a DNA expert, *which based on defendant's admission*, Baum believed would only corroborate the State's case against his client.

But this admission did not, and could not, excuse Baum's duty to conduct a thorough investigation into the State's case, nor did it excuse his duty to advocate for his client and obtain the best possible plea offer through that investigation. Under "prevailing professional norms" as defined both by professional standards and controlling case law, though such admissions may "limit" counsel's investigation in some ways, it does not obviate his duty to

advocate for his client or his duty to investigate the factual basis for the State's allegations.

These duties apply, as reflected in the ABA's Standards for Criminal Justice, to both innocent and guilty clients:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues leading to facts relevant to the merits of the* case and the penalty in the event of conviction. . . . *The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty*.[116]

Further, controlling case law in this State clearly holds that a defendant's admissions do not allow a defense attorney to refuse to fight the allegations against his client. In *A.N.J.*, the State argued that once he believed his client "began to admit" guilt, defense counsel had no duty to investigate or challenge the State's case. The court flatly rejected this argument, holing that "the fact that [defense counsel] seemed to believe that his client was going to confess, or even was guilty, was not enough to excuse some investigation."[117]

Thus, to the extent that the trial court's order implies that Mr. Juntunen's admissions may have excused Baum from conducting a thorough

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[116] American Bar Association Standards for Criminal Justice, Standard 4- 4.1(a), Duty to Investigate (3d ed. 1993); *see also Strickland v. Washington.* 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.")

[117] *Id.*

investigation, or challenging the State's evidence, this Court should, and must reject it.

e) Baum's personal belief that an expert's opinion would not have helped Mr. Juntunen's defense is insufficient to excuse his failure to hire a qualified DNA expert.

With Mr. Juntunen's admission of guilt excluded as a valid excuse, all that is left is Baum's person opinion about what the DNA evidence might mean. But this reason is no better of an excuse than the former, as it is contradicted by the facts of this case and controlling precedent.

First, Baum's claim that he personally believed an expert would be fruitless is belied by Baum's own conduct. Had Baum truly believed that pursuing such an expert was useless, he would not have spent *hours* searching for an expert, nor would he have filed a motion with the court, asking for public funds to pay for an expert who he thought could provide no help to his client's case. In fact, Baum promised, in his declaration to the court, that these efforts were reasonably necessary to Mr. Juntunen's defense.

Second, even if Baum had actually interviewed the State's DNA expert, his lay opinion about that expert's conclusions are no substitute for the opinion of a qualified expert in DNA analysis, a notoriously complex area, both in law and in science.

Such an expert could have, if retained, provided insight into ways to challenge the purported "match" of Mr. Juntunen's DNA to that found on the

discarded tissue. When forensic scientists compare an unknown sample of DNA from a crime scene with a known sample from a suspect, they may find a scientifically relevant number of similarities. But in doing so they are not stating unequivocally that the suspect is the source of the DNA or a "match." Instead, they are merely stating a probability that the suspect was the source of the DNA.[118]

Baum, in essence, treated the State's DNA evidence, and the conclusions of its experts, as if it made Mr. Juntunen's guilt a foregone conclusion. By doing that, Baum displayed exactly why a DNA expert in this case could have been crucial for the defense to obtain a better result, either by plea or trial.

Finally, Baum's fear that the DNA results would have produced an "additional witness" against the defense is equally unconvincing because Mr. Juntunen pleaded guilty at Baum's direction, making the potential for cumulative evidence wholly irrelevant. Thus, there was absolutely no risk for Baum to at least hire a consulting DNA expert to assist him in his evaluation of the State's evidence, especially when he ultimately told Mr. Juntunen to plead guilty, rather than exercise his right to a trial. The State could not, for example, withdraw its plea offer simply because the defendant exercised his

[118] *State v. Bander*, 150 Wn. App. 690, 720, 208 P.3d 1242, 1256 (2009).

constitutional right to examine the State's evidence[119] or interview a particular witness.[120]

f) The only reasonable explanation for Baum's failure to hire a consulting expert is a lack of due diligence.

In the end, Baum's decision to not follow up with the court to obtain a DNA expert was simply a lack of due diligence. This excuse, however, does not allow a reasonable attorney to stop investigating when he is fully aware that one line of defense could ultimately result in his client's full acquittal. As the Third Circuit observed in *Beard*, although "it may be risky for an attorney to ask questions for which he believes the answer may be harmful," that risk "is no excuse for failing to elicit significant evidence when the risk of an adverse response has been created by counsel's failure to conduct a thorough investigation or understand key, undisputed facts in the record."[121]

Though this court must initially presume that Baum's decision to not call a DNA expert was a reasonable trial tactic,[122] this presumption fails under

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[119] *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002) (a defendant's confrontation right to challenge the accuracy and veracity of key prosecution witness overrides state's asserted interest to not reveal the precise location of an observation post; there is no privilege encompassing surveillance locations).

[120] *See State v. Hofstetter*, 75 Wn.App. 390, 878 P.2d 474 (1994) (prosecutor may not threaten to withdraw plea bargain if a witness speaks with defense attorney without prosecutor being present).

[121] *Showers v. Beard*, 635 F.3d 625, 633 (3d Cir. 2011) (holding that defense counsel was ineffective when he "failed to investigate readily available key evidence in support of the defense's chosen theory . . . or make a reasonable decision that investigation was unnecessary.).

[122] *State v. Wilson*, 29 Wash.App. 895, 626 P.2d 998 (1981).

the facts here because no reasonable excuse explains why a reasonable attorney in Baum's position would have decided to test the State's only piece of evidence linking Mr. Juntunen to the charged crimes.[123]

In *Jury*, the defendant overcame the presumption of competence by showing that defense counsel failed to interview several witnesses before trial, did not subpoena them to appear at trial, and could not explain what, if anything, these witnesses would have said if they had testified.[124]

In *Pavel,* defense counsel failed to interview an important witness pre-trial even though the witness was readily available and known to defense counsel. Based on the record before it, the Second Circuit concluded that no reasonable trial tactic could justify the failure to interview the witness. Instead, the court concluded that defense counsel was merely lazy, and did not interview the witness out of a "desire to save himself labor."

The court also rejected the State's argument that defense counsel had no duty to investigate simply because the defense *might* fail, reasoning that defense counsel's

> decision as to which witnesses to call was animated primarily by a desire to save himself labor—to avoid preparing a defense that might ultimately prove unsuccessful. [Counsel's] decision not to call any witnesses other than [the defendant] was thus "strategic" in the sense that it related to a question of

[123] *See State v. Jury*, 19 Wash.App. 256, 263, 576 P.2d 1302 (1978).
[124] *Id.* at 264

> trial strategy-which witnesses to call. And it was "strategic" also in that it was taken by him to advance a particular goal.[125]

Because this goal was "mainly avoiding work—not, as it should have been, serving [the defendant's] interests by providing him with reasonably effective representation," we determined that our usual hesitation to disturb such strategic decisions "ha[d] no bearing" in that case.[126]

Here, just as in *Jury* and *Pafvelk*, the only reasonable explanation for counsel's failures here is a lack of due diligence. Just because a DNA *might* not have been able to successfully challenge the State's evidence is simply no excuse here, just as it was no excuse in *Jury* and *Pafvelk*.

4. **Mr. Juntunen was Prejudiced by Baum's Failure to Conduct a Thorough Investigation. Had Counsel Conducted a Reasonable Investigation, there is a Reasonable Probability that Mr. Juntunen would Have Received a Better Result, i.e. a Better Plea Offer, or Would have rejected the plea offer and gone to trial.**

Having established deficient performance, Mr. Juntunen must also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[127] "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."[128] Applying the

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[125] *Id.* at 218.
[126] *Id.* at 218-19.
[127] *Hinton v. Alabama*, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014)
[128] *Id.*

Strickland standard here, we must answer the following question: is it reasonably probable that the results of a thorough investigation into the State's DNA evidence could have changed the result of the plea or trial? [129]

In the context of failing to hire a valuable defense expert, in *Hinton*, the court observed that to show prejudice, the defendant need only show "a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer's deficient performance and is entitled to a new trial."[130] Here, Mr. Juntunen has certainly done that.

Hiring a defense expert to challenge, or at least evaluate the State's expert's DNA analysis was crucial to negotiating a better plea, or, alternatively, obtaining a favorable result at trial.

Evidence that tends to show that the defendant was not the person who committed the charged crime carries great weight with the jury. If such evidence exists, but counsel fails to investigate or use that evidence, courts

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[129] *Lafler*, 132 S. Ct. at 1384; *Meyers v. Gillis*, 142 F.3d 664, 668 (3d Cir. 1998) (defendant prejudiced by counsel's erroneous advice leading him to plead guilty to second-degree murder when offense might have been reduced to second-degree murder had he proceeded to trial).

[130] *Hinton*, 134 S. Ct. at 1089

routinely find prejudice.[131] DNA evidence specifically is some of the most powerful evidence available to the defense to help exonerate his client.

DNA evidence in fact tends to have more effect on the jury than it rationally should. As many courts have observed, "DNA evidence is often assumed to have a special aura of certainty and mystic infallibility."[132] So it should be no surprise when courts find prejudice even when there is other convincing evidence to identify the defendant. Courts have found prejudice, even when the defendant confessed to the crimes[133] and even when an eye-witness positively identifies the defendant.[134]

Here, the State lacked either type of corroborating evidence. Thus, its entire case depended upon the opinion of its one expert from the WSP Crime Lab. This is the *THE* reason why Baum had an absolute duty to investigate the efficacy of that evidence: a successful challenge would have resulted in a full acquittal. Had the evidence, apart from the DNA evidence clearly pointed to Mr. Juntunen, Baum's conduct, though deficient, would have been excusable. But, in fact, the opposite was true.

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[131] *See, e.g., Alcala v. Woodford*, 334 F.3d 862, 872 (9th Cir.2003); *Hart v. Gomez*, 174 F.3d 1067, 1073 (9th Cir.1999).
[132] *People v. Watson*, 2012 IL App (2d) 091328, 965 N.E.2d 474, 482 appeal denied, 968 N.E.2d 1072 (Ill. 2012) (citing Joel D. Lieberman *et al., Gold Versus Platinum: Do Jurors Recognize the Superiority of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 Psychol. Pub. Pol'y & L. 27, 52 (2008)).
[133] *Baylor*, at 1325.
[134] *Johnson v. Baldwin*, 114 F.3d 835, 838 (9th Cir.1997)

Finally, Baum's blind acceptance of the State's evidence as true does not minimize the potential value of a qualified defense expert. As the court observed in *Hinton*, the State's forensics experts make mistakes, and it is the job of a qualified expert too point those mistakes out to defense counsel:

> Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials.... One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

In the end, Baum's failure to hire a consulting expert, which was clearly based upon a lack of due diligence, prevented Mr. Juntunen from knowing the true strength of the State's evidence, and thus from making an informed and intelligent decision to plead guilty.

Baum had a duty to advance Mr. Juntunen's best interests before telling him to plead guilty. To do this, he needed to gather enough information so that Mr. Juntunen could make an informed and intelligent decision to plead guilty, rather than take the case to trial. This requires Baum to give a fully informed opinion about the likelihood of conviction if the defendant went to

trial.[135] This was simply impossible unless and until Baum hired a consulting expert, who would have tested the State's DNA evidence, and spoke with him about the results of the expert's findings.[136]

D. BAUM REPRESENTED REGGIE DESPITE A CLEAR CONFLICT OF INTEREST: HIS DUAL ROLE AS A SPECIAL PROSECUTOR IN A LOCAL JURISDICTION. THIS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL PER SE.

1. Conflicts of Interest are Reviewed De Novo

The court reviews whether circumstances demonstrate a conflict of interest de novo.[137]

2. Representing a Client Despite a Conflict of Interest is Ineffective Assistance of Counsel.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."[138] This right includes the right to the assistance of an attorney who is free from any conflict of interest in the case.[139]An attorney has an obligation to avoid conflicts of interest and to

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[135] *Lafler*, 132 S. Ct. at 1384 (2012) (finding counsel's performance was deficient because "he advised respondent to reject the plea offer on the grounds he could not be convicted at trial.")

[136] *See, e.g., Richey v. Bradshaw,* 498 F.3d 344, 362 (6th Cir.2007) ("[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable.").

[137] *State v. Vicuna*, 119 Wn.App. 26, 30–31, 79 P.3d 1 (2003), review denied, 152 Wn.2d 1008 (2004).

[138] U.S. Const. amend. VI; *State v. Dhaliwal*, 150 Wn. 2d 559, 566, 79 P.3d 432, 436 (2003).

[139] *State v. Davis,* 141 Wash.2d 798, 860, 10 P.3d 977 (2000).

advise the court promptly when a conflict of interest arises.[140] The trial court, in turn, has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists.[141] "The trial court should protect the right of an accused to have the assistance of counsel."[142]

A conviction must be reversed due to a violation of the constitutional right to counsel if the defendant can show that his attorney had an "actual conflict of interest."[143] Thus, "a defendant asserting a conflict of interest on the part of his or her counsel need only show that a conflict adversely affected the attorney's performance to show a violation of his or her Sixth Amendment right."[144] A conflict adversely affects an attorney's performance if, "during the course of the representation, the attorney's and the defendant's interests diverge[d] with respect to a material factual or legal issue or to a course of action."[145]

Reversal is required if the defendant shows the conflict (1) "cause[d] some lapse in representation contrary to the defendant's interests" or (2) "likely affected particular aspects of counsel's advocacy on behalf of the

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[140] *Cuyler v. Sullivan,* 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).
[141] *Mickens v. Taylor,* 535 U.S. 162, 167-72, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (citing *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)).
[142] *Holloway,* 435 U.S. at 484.
[143] *Dhaliwal,* 150 Wn.2d at 571
[144] Id.
[145] *State v. Regan,* 143 Wn. App. 419, 428, 177 P.3d 783 (2008)

defendant."[146] Once a defendant demonstrates an "actual conflict of interest," he need not show prejudice in order to be entitled to relief.[147] In other words, he need not show the outcome of the trial would have been different but for the conflict.[148] These conflict of interest rules apply in any situation where defense counsel represents conflicting interests.[149] Thus, they apply in cases, like this one, where counsel acts as a defense attorney and a prosecutor within the same jurisdiction.[150]

3. **Baum's Duties as a Municipal Court Prosecutor within Lewis County Created a Conflict of Interest that Disqualified him From Representing Mr. Juntunen in His Felony Charges within that Same County.**

A defense attorney cannot act as a prosecutor and a defense attorney within the same jurisdiction because such joint representation creates a conflict of interest between those accused of a crime (the defendant) and the people who live within that same jurisdiction (i.e. the county).[151] The Supreme Court addressed this very issue in *Tracer,* in which the Court held that "a conflict of interest exists when an attorney represents a criminal defendant in superior court and simultaneously acts as a prosecuting attorney

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[146] *Id.* (internal quotation marks and citations omitted).
[147] *Id.*
[148] *Mickens,* 535 U.S. at 173-75.
[149] *State v. McDonald,* 143 Wn.2d 506, 513, 22 P.3d 791 (2001).
[150] *State v. Tracer,* 173 Wn. 2d 708, 719, 272 P.3d 199, 204 (2012)
[151] *Tracer,* 173 Wn. 2d at 71 (also citing, as good law, *State v. Tjeerdsma,* 104 Wash.App. 878, 884–85, 17 P.3d 678 (2001) in which the court of appeals held that a conflict of interest was created when attorney representing a criminal defendant in Skagit County Superior Court was appointed as a special deputy prosecuting attorney for the Skagit County Prosecuting Attorney's Office in an unrelated case).

in the same county."[152] In that case, after a prosecutor failed to show up for a pre-trial hearing in Superior Court, the trial court appointed a local defense attorney to stand in for the missing prosecutor.[153]

This appointment, the Court reasoned, created a concurrent conflict of interest because it created "the appearance of impropriety" by requiring the defense attorney to fill two "inherently antagonistic and irreconcilable roles": that of the defense attorney, who must advocate for criminal defendants, and that of his adversary, the prosecutor, who must advocate for the interests of the State.[154] The Court noted that this would still create a conflict of interest, even if the two cases were entirely "unrelated."[155] Further, the Court held there to be a conflict, even after recognizing that Tracer's right to a fair trial was probably unaffected by the conflict, reasoning that it was sufficient to disqualify counsel simply because one party's interests merely "*appeared* to have been compromised."[156]

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[152] *Id.* The court also observed a similar conflict exists when "an attorney serves as a misdemeanor defense attorney in municipal court and also intermittently acts as a prosecuting attorney pro tempore for the city." *Id.*
[153] *Id.* at 713.
[154] *Id.*
[155] *Id.* at 719, *quoting* (RPC 1.7(a)(1) cmt. 6) (citing an advisory ethics opinion stating that a concurrent conflict of interest arises when an attorney serves as a misdemeanor defense attorney in municipal court and also intermittently acts as a prosecuting attorney pro tempore for the city. The RPC committee found this to be true even though the attorney's representation of the defendants and the city related to different matters. Wash. State Bar Ass'n Advisory Op. 1766 (1997), available at http://mcle.mywsba.org/IO/.
[156] *Id.* at 721.

This case is similar to the conflict found in *Tracer*. Like in *Tracer*, Baum "regularly represented criminal defendants in actions brought" in Lewis County, including Mr. Juntunen, while also acting as a prosecutor within the same county. During the plea hearing, Baum admitted that throughout his representation of Mr. Juntunen in Lewis County Superior Court, he continued to prosecute cases in the city of Winlock, located within the same county. This created a clear conflict of interest under *Tracer* and the relevant RPC's cited therein.

Although the defense attorney in *Tracer* was prosecutor for the State (rather than a city within that State), this distinction is irrelevant. Prosecutors for the State of Washington and for the cities contained therein have the power, authority, and duty to enforce State laws. Once Mr. Baum was appointed to represent a municipality within the area, the government became his client. This arrangement adversely affected the interests of the criminal defendants represented by Mr. Baum.[157] Further, just as the conflict in *Tracer*, Baum's dual roles as a prosecutor and a defense attorney within the same county created "the appearance of impropriety." The appearance of impropriety is no less significant simply because Mr. Baum was only prosecuting misdemeanor cases.

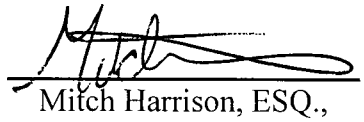
[157] *Id.* at 720-21.

Because of Mr. Baum's concurrent conflict, Reggie should be allowed to withdraw his guilty plea, Baum's representation of Mr. Juntunen constituted ineffective assistance of counsel, without a showing of prejudice.[158] On this basis alone, the trial court should have granted Mr. Juntunen's motion to withdraw his plea, and it abused its discretion by denying that motion.

VI. CONCLUSION

The trial court's determination that Baum's performance complied with reasonable professional norms was based upon "an incorrect legal standard or the facts do not meet the requirements of the correct standard" of upon facts that are unsupported by the record.[159] The trial court therefore abused its discretion in ruling that Mr. Juntunen received effective assistance of counsel during plea negotiations.

Dated April 6, 2015,



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[158] *Davis,* 141 Wash.2d at 864, 10 P.3d 977 ("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.").
[159] *In re Marriage of Litfiefield,* 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

CERTIFICATE OF SERVICE

I, Mitch Harrison, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this **Amended Brief of Appellant** on the following persons in the manner indicated below:

Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402	☒U.S. Mail ☐Email: ☐Fax:
Lewis County Prosecuting Attorney Law & Justice Center 345 West Main Street Chehalis, WA 98532	☒U.S. Mail ☐Email: ☐Fax:
Reginald Juntunen, DOC #322582 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520	☒U.S. Mail ☐Email: ☐Fax:

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THE FOREGOING IS TRUE AND CORRECT.

Dated April 6, 2015,

Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant